No. 321.

Office Supreme Court U.S.
FILED
SEP 22 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Porter for D.E.

Filed Sept. 22, 1902.

IN THE

Supreme Court of the United States.

October Term, 1902

NO. 321.

THE KANSAS CITY SUBURBAN BELT RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

ANDREW HERMAN, a minor, by his next friend, Martin Herman, and the UNION TERMINAL RAILWAY COMPANY,

DEFENDANTS IN ERROR.

W. B. SUTTON,
SILAS PORTER,
Counsel for said Defendant in Error.

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DEFENDANTS IN ERROR.

Notice of Motion.

To Messrs. LATHROP, MORROW, FOX and MOORE,
Counsel for Plaintiff in Error.

Please take notice that on Monday, the 20th

day of October, 1902, at the opening of the court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the said court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with the said motions in support thereof.

SILAS PORTER,
Counsel for Defendent in Error,
for the Purposes of these Motions.

Motion of Defendant in Error to Dismiss or Affirm Under Fifth Clause of Rule 6.

Comes now the defendant in error, Andrew Herman, a minor, by his next friend, Martin Herman, by his counsel appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree to which the said writ of error is directed is a judgment or decree of the Supreme Court of one of the United States, to-wit, of the State of Kansas, and because the want of jurisdiction is apparent from the record.

And the said defendant in error, by counsel, as aforesaid, also moves the court to affirm the said judgment or decree to which said writ of error is

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directed, because although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, and because it is manifest from the record that the question on which the jurisdiction of this court depends is so frivolous as not to need further argument, and because there is no merit in the said writ of error.

STATEMENT.

Andrew Herman, a minor, by his next friend, Martin Herman, brought this action in the Court of of Common Pleas of Wyandotte County, Kansas, September 18th, 1897, against the Union Terminal Railway Company, a resident corporation, and the Kansas City Suburban Belt Railway Company, a Missouri corporation, to recover $10,000 for the loss of a foot, charging them in his petition as joint tort-feasors.

The petition alleged among other things that the resident corporation built and owned the road, and the non-resident corporation operated it in connection with the other company. (Rec. p. 1.)

The Suburban Belt Railway Company, upon the answer day presented their petition and bond for removal in proper form upon the ground of a separable controversy. (Rec. p. 4, 5, 6.)

The State Court denied the petition for removal, (Rec. p. 7), and a transcript was filed in the Circuit Court of the United States, and upon motion the cause was remanded to the State Court. (Rec. p. 15).

Upon the first trial, which resulted in a disagreement of the jury, each defendant at the conclusion of the plaintiff's evidence filed a separate demurrer to the evidence (Rec. p. 10-11). The court overruled the demurrer of the Suburban Belt Railway Company and sustained the demurrer of the Union Terminal Company, (Rec. p. 11), to which ruling of the court sustaining the demurrer of the resident defendant plaintiff below excepted. (Rec. p. 12).

Thereupon, in the midst of the trial, the Kansas City Suburban Belt Railway Company, plaintiff in error, filed a new petition and bond for removal, reciting the facts as above, (Rec. p. 12), which the State Court denied. (Rec. p. 16).

The trial then proceeded and resulted in a mistrial, on account of the failure of the jury to agree. This was on October 20th, 1897, (Rec. p. 9). On the discharge of the jury plaintiff below obtained leave of court to file an amended petition, and subsequently did file an amended petition reducing the ad damnum to $1,999.00. (Rec. p. 17-20). The cause was subsequently tried on the amended pe-

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tition, and resulted in a verdict and judgment June 27th, 1899, in favor of plaintiff below for $1,500.00.

The cause was appealed to and affirmed by the Kansas Court of Appeals, and again appealed to the Supreme Court of Kansas, where the decision was once more affirmed.

BRIEF AND ARGUMENT.

There is color for the motion to dismiss under the authority of Whitcomb vs. Smithson, 175 U. S., 635.

The record shows that the Circuit Court remanded the case to the State Court and ruled that there was no separable controversy.

The contention here is that when the trial court at the conclusion of plaintiff's testimony sustained the demurrer of the resident defendant, the result was to make the case there and then removable, and upon this theory a second petition for removal was presented, and the error complained of is the refusal of the State Court to grant this second petition for removal.

But this was a ruling upon the merits adverse to plaintiff below, and to which he saved his exceptions, and is squarely within the scope of the decision in Whitcomb vs. Smithson, *supra*.

The only difference between this case and Whitcomb vs. Smithson, *supra*, is that, in this case

the first petition for removal did not allege as one of the grounds for removal that the Union Terminal Railway Company was joined fraudulently, while that was one of the grounds alleged in the first petition in Whitcomb vs.. Smithson.

I.

First, we say that the ruling of the State Court upon the demurrer to plaintiff's evidence being *in invitum* could not make the case removable during the progress of the trial.

Whitcomb vs. Smithson, *supra.*

Cited and affirmed in Chess. & O. Ry. Co. vs. Dixon, 179 U. S., 131.

II.

Second, plaintiff in error does not bring here the record of the trial showing the evidence offered by defendant in error (plaintiff below) in support of the cause of action against the Union Terminal Railway Company, and this court has only the averments made in the petition for removal, which state that "no evidence was offered to sustain a cause of action against the resident defendant," upon which to determine how much or how little was in fact offered.

The plaintiff below filed an answer to the second petition for removal (Rec. p. 15) explaining why certain evidence relied upon was not intro-

duced; but there is nowhere an admission that no evidence was introduced.

If a non-resident defendant can, during the progress of the trial on the merits, make a case immediately removable by presenting a petition for removal at the conclusion of plaintiff's testimony, simply alleging that "no evidence was offered to sustain a joint cause of action as against the resident defendant," great confusion would result, because counsel frequently differ upon the proposition as to whether any evidence to sustain this or that point has in fact been given.

III.

Third, after the mis-trial October 20th, 1898, while the court had jurisdiction of the cause and all the parties, plaintiff below had the right by leave of court to amend his petition and reduce the *ad damnum*.

Neither of the petitions for removal had any life, force or effect if the case was not removable at the time they were respectively presented.

We respectfully ask on affirmance.

W. B. Sutton,
Silas Porter,
Counsel for said Defendant in Error.